STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 20, 2007
v	No. 272341 Wayne Circuit Court
JOHNNY JOHNSON, Defendant-Appellant.	LC No. 06-001141-01

Before: Bandstra, P.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from a conviction of first-degree home invasion, MCL 750.110a(2)(b), for which he was sentenced to 2 to 20 years in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).[1]

Someone entered a residential placement facility for abused children. Entry appeared to have been made through a window that was found to be open with its screen cut. A youth supervisor locked herself in an office after seeing the intruder. She later noticed someone in the same clothing outside the building getting into a white Suburban. When another employee arrived, the Suburban's driver, identified as defendant, followed her and was eventually intercepted by the police. Two residents of the facility testified that defendant had entered their rooms. One resident, who was in bed, stated that defendant pulled down her blankets, tapped her, and asked some questions. He also rummaged through her belongings. Defendant admitted to the police that he entered the building and went inside a resident's room.

Defendant first contends that the trial court erred in ruling that his police statement was admissible at trial. In reviewing a trial court's determination on a motion to suppress a confession, this Court reviews the record de novo but will defer to the trial court's factual findings unless they are clearly erroneous. *People v Harris*, 261 Mich App 44, 53; 680 NW2d 17 (2004); *People v Adams*, 245 Mich App 226, 235; 627 NW2d 623 (2001). "The trial court's factual findings are clearly erroneous if, after review of the record, this Court is left with a

[1] We would note that the parties have stipulated to the withdrawal of Issue III in defendant's brief on appeal based on correction of the presentence report.

definite and firm conviction that a mistake has been made." *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

"A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights." *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). The burden is on the prosecution to prove a valid waiver of rights by a preponderance of the evidence. *People v Cheatham*, 453 Mich 1, 27; 551 NW2d 355 (1996). Whether a waiver of one's rights is voluntary and whether an otherwise voluntary waiver is knowing and intelligent are separate questions. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997).

The issue of voluntariness is to be determined solely by examining police conduct and cannot be resolved in defendant's favor absent some police coercion, intimidation, or deception. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005); *People v Garwood*, 205 Mich App 553, 555; 517 NW2d 843 (1994). The test of voluntariness is whether, considering the totality of the circumstances, the statement was the product of an essentially free and unconstrained choice or whether it was the result of an overborne will. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988).

A knowing and intelligent waiver requires that the defendant is aware of his rights, knows that the state intends to use his statements to secure a conviction, and knows that he can remain silent and request a lawyer. *People v Daoud*, 462 Mich 621, 637, 640-641; 614 NW2d 152 (2000); *Cheatham, supra* at 29. In determining whether the defendant knowingly and intelligently waived his rights, an objective standard is used because a defendant's subjective understanding cannot be known. *Daoud, supra* at 634 n 10; *Garwood, supra* at 557. Such a determination depends on the totality of the objective circumstances surrounding the waiver, including the defendant's education, experience, conduct, and intelligence as well as the defendant's capacity to understand the nature of his rights and the warnings given. *Daoud, supra* at 634, 636; *Howard, supra* at 538. "Intoxication from alcohol or other substances can affect the validity of a waiver of Fifth Amendment rights, but is not dispositive." *Tierney, supra* at 707.

It was defendant's theory that he was too intoxicated to understand and voluntarily waive his rights. According to the testimony at the evidentiary hearing, defendant advised the interrogating officer, Otis Combs, that he had been drinking but did not recall when he had last consumed alcohol. The evidence showed that defendant had been in custody for five hours before being questioned and that he did not have access to alcohol during that time. Combs testified that he did not believe defendant to be under the influence of alcohol. He stated that he did not detect an odor of alcohol and noted that defendant's eyes were "white and clear," his gait was steady, his speech was not slurred, and there was nothing unusual about defendant's appearance. Further, defendant knew where he was and was able to converse in a coherent manner and answer questions appropriately. Another officer who was called in to assess defendant's condition testified that he did not detect an odor of alcohol and noted that defendant was steady on his feet and his speech was not slurred. Combs further testified that defendant was twice advised of his rights, indicated that he understood them, and agreed to make a statement. There was no evidence that defendant was coerced, intimidated, deceived, or otherwise mistreated. Defendant was questioned the one time and the entire session lasted a little over two hours.

We agree with the trial court that under the totality of the circumstances defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. He was advised of his rights twice, indicated that he understood them, and agreed to waive them and make a statement. He was not subjected to prolonged questioning and there is no evidence that he was abused or otherwise mistreated. Although defendant professed to be intoxicated, all objective factors indicated that he was not. Therefore, the trial court correctly ruled that defendant's statement was admissible at trial.

Defendant next contends that the trial court should have suppressed his statement because it was not recorded. Defendant did not raise this issue below and thus it has not been preserved for appeal. *People v Hogan*, 225 Mich App 431, 438; 571 NW2d 737 (1997). Therefore, defendant must show plain error that affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The United States Supreme Court has rejected the idea that due process requires the police to record custodial interrogations. *People v Geno*, 261 Mich App 624, 627; 683 NW2d 687 (2004), citing *California v Trombetta*, 467 US 479; 104 S Ct 2528; 81 L Ed 2d 413 (1984). This Court has also rejected any claim that the Michigan Constitution requires a custodial interrogation to be recorded. *Geno*, *supra* at 627-628; *People v Fike*, 228 Mich App 178, 183-186; 577 NW2d 903 (1998). While defendant urges this Court to reject *Geno* and *Fike*, we are required to follow them pursuant to MCR 7.215(J)(1). Accordingly, defendant has failed to establish any error.

Affirmed.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood